(39530) SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
OCT 10 1969
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1969

No. 552

ALBERT SHANKER, individually and as President of the United Federation of Teachers, Local 2, American Federation of Teachers, AFL-CIO and UNITED FEDERATION OF TEACHERS, LOCAL 2, AMERICAN FEDERATION OF TEACHERS, AFL-CIO,

Appellants,

against

J. LEE RANKIN, Corporation Counsel of The City of New York, on behalf of The Board of Education of The City of New York,

Appellee.

On Appeal from the Court of Appeals of the State of New York

MOTION TO DISMISS APPEAL

J. LEE RANKIN,
Corporation Counsel
of the City of New York,
Counsel for Appellee,
Municipal Building,
New York, New York 10007.

FREDERIC S. NATHAN,
STANLEY BUCHSBAUM,
WILLIAM M. MURPHY,
of Counsel.

TABLE OF CONTENTS

PAGE

STATEMENT OF THE CASE 2

POINT I — With a single exception, New York tries all categories of criminal contempt cases without a jury. To remedy abuses which arose in criminal contempt proceedings brought in cases arising out of private labor disputes, it provided for jury trials in such cases only. The absence of such a jury trial exception for cases arising out of strikes by governmental employees does not deny equal protection where there has been no history of abuse and where the Legislature guarantees private employees the right to strike, while absolutely barring strikes by public employees 4

POINT II — New York's failure to grant a jury trial to non-critical governmental employees involved in contempt proceedings is not overly broad because (1) the denial serves to strengthen New York's strike ban and (2) the exception made for private employees from New York's general procedure, which does not provide a jury in contempt proceedings, was done to cure abuses that did not exist in the public sector 10

CONCLUSION 19

TABLE OF AUTHORITIES

Cases:

PAGE

New York City Tr. Auth. v. Loos, NYLJ, December 20, 1956, p. 3, col. 7 8
New York City Tr. Auth., 9 Misc 2d 492 (1957) 8

Patsone v. Pennsylvania, 232 U.S. 138 (1914) 10, 15
People ex rel. Frank v. McCann, 253 N.Y. 221 (1930) 5

Railway Express Agency v. New York, 336 U.S. 106 (1949) 11
Railway Mail Assn. v. Corsi, 326 U.S. 88 (1945) 11
Rankin v. Shanker, 23 N.Y. 2d 111 (1968) 6, 14
Rathbford v. Holmes, 5 Hun 317 (1875) 5

State of New York v. Fuller, 31 A D 2d 73 (1968) 9

United States v. Bernett, 376 U.S. 681 (1964) 5
United States v. Mine Workers, 330 U.S. 258 (1947) 6

Williamson v. Lee Optical Co., 348 U.S. 483 (1955) 11

Statutes:

Norris LaGuardia Act, 47 Stat. 70, 29 U.S.C. § 101 15;
29 U.S.C. 3692: 5, 7

Latin Norris-LaGuardia Act, N.Y. Laws 1935, chs. 206, 390, 477 5, 6, 10, 12, 16

Condon Wadlin Law, N.Y. Laws 1947, ch. 391 7

Taylor Act, N.Y. Laws 1967, ch. 392 8

N.Y. Civil Service Law Art. 14
209(1) 2
211 8, 12

N.Y. Judiciary Law
730(A)(3) 5
751 8, 10
752 6

PAGE

N. Y. Labor Law
§703 9
§713 9
§807 5
§808 5, 6

Other Authorities:

Congressional Record, vol. 75 7

Frankfurter & Greene, *The Labor Injunction* (1930) 7

Governor's Committee on Public Employee Relations, Final Report (March 31, 1966) 9

Green, *Legal Aspects of the Labor Movement*, 15 Ore. Law Rev. 13 (1935) 7

Nelles, *Summary Power to Punish for Contempt*; 31 Col. Law Rev. 956 (1931) 5

13th Annual Report of the New York Judicial Council; p. 253 5

IN THE

Supreme Court of the United States

October Term, 1969

No. 552

ALBERT SHANKER, individually and as President of the United Federation of Teachers, Local 2, American Federation of Teachers, AFL-CIO and UNITED FEDERATION OF TEACHERS, LOCAL 2, AMERICAN FEDERATION OF TEACHERS, AFL-CIO,

Appellants,

against

J. LEE RANKIN, Corporation Counsel of The City of New York, on behalf of The Board of Education of The City of New York,

Appellee.

On Appeal from the Court of Appeals of the State of New York

MOTION TO DISMISS APPEAL

Appellee moves pursuant to Rule 16 of the Rules of the Supreme Court of the United States to dismiss the appeal on the grounds that no substantial federal question is presented by this appeal.

Statement of the Case

Appellant, United Federation of Teachers, Local 2, American Federation of Teachers, AFL-CIO (UFT), and its President, the appellant, Albert Shanker, were found guilty of criminal contempt of court for wilfully and deliberately disobeying court orders enjoining them from engaging in a strike against the Board of Education of the City of New York.

Appellants' sole contention here is that the denial of their request for a jury trial violated the equal protection and due process clauses of the Fourteenth Amendment.

The strike began on September 9, 1968, in violation of New York law prohibiting strikes by public employees (N.Y. Civil Service Law, §210[1]). The UFT and most of its more than 55,000 members remained on strike from September 9 to September 11, from September 13 until September 27, and from October 11 until November 18, 1968. The result was a virtually complete shutdown of the New York City public school system and the loss of 35 school days to more than one million pupils.

The day the strike began appellee commenced an action for an injunction and the same day obtained a temporary restraining order forbidding strike action. The temporary restraining order was continued in effect by the New York Supreme Court until superseded on September 30, 1968, by a preliminary injunction containing identical restraining provisions.

At the commencement of the hearing on appellee's motion to punish for criminal contempt, appellants demanded a jury both as a matter of state law and under the federal Constitution. The motion for a jury trial was denied by the trial court (Juris. App. D, pp. 53a-62a).* Appeals from this intermediate determination were taken to the Appellate Division of the New York Supreme Court which affirmed without opinion (30 AD 2d 956, 294 N.Y.S. 2d 680) and to the Court of Appeals, which rejected both the state and federal claims (Juris. App. C, pp. 31a-51a, 23 N.Y. 2d 111, 295 N.Y.S. 2d 625). An application for a stay of trial pending an appeal to this Court was denied by the full bench after a hearing before Mr. Justice Harlan (393 U.S. 930).

The trial then began without a jury on November 13, 1968 with the strike still in progress. Both appellants were convicted (Juris. App. B, pp. 3a-30a). Shanker was sentenced to fifteen days imprisonment and a $250 fine; UFT was fined $220,000. Their convictions were affirmed by the Appellate Division (31 A.D. 2nd 1010, 299 N.Y.S. 2d 374 [per curiam]) and the Court of Appeals (Juris. App. A, pp. 1a-2a, 25 N.Y. 2d 780, N.Y.S. 2d).

* Juris. refers to Appellants' Jurisdictional Statement

POINT I

With a single exception, New York tries all categories of criminal contempt cases without a jury. To remedy abuses which arose in criminal contempt proceedings brought in cases arising out of private labor disputes, it provided for jury trials in such cases only. The absence of such a jury trial exception for cases arising out of strikes by governmental employees does not deny equal protection where there has been no history of abuse and where the Legislature guarantees private employees the right to strike, while absolutely barring strikes by public employees.

We note first the general rules that the burden of establishing the unconstitutionality of a statute rests on the party who assails it and that a "statutory discrimination will not be set aside as the denial of equal protection of the laws if any state of facts reasonably may be conceived to justify it." *Metropolitan Co.* v. *Brownell*, 294 U.S. 580, 584 (1935).

Basically, appellants' contention is that violations of injunctions against strikes by public employees are no different from violations of the more limited injunctions against activities relating to strikes by private employees and that to provide jury trials for the latter and not for the former violates the constitutional mandate. The similarity, however, is superficial for behind the different treatment lies both a history of abuse in the private arena that had no counterpart in the public sector and a wholly different legislative treatment of strikes in the private and public sectors.

(1)

Under the New York Constitution there is no requirement that there be a trial by jury in criminal contempt proceedings. *People ex rel. Frank v. McCann*, 253 N.Y. 221 (1930). See *Rutherford v. Holmes*, 5 Hun 317, 319 (1875). Section 750, subd. A, par. 3, of the New York Judiciary Law provides that a court of record has power to punish for criminal contempt a person guilty of wilful disobedience of its lawful mandate. This provision for trial of a criminal contempt by the court has been in the statutory law of New York since 1829. See Nelles, *Summary Power to Punish for Contempt*, 31 Col. Law Rev. 956, 967 (1931); 13TH ANNUAL REPORT OF THE NEW YORK JUDICIAL COUNCIL at p. 253. See, as to earlier periods, *United States v. Barnett*, 376 U.S. 681, 714-716 (1964).

The maximum jail sentence for criminal contempt has remained at thirty days since 1829. Criminal contempt therefore has always been a petty offense in New York so that there is no federal-constitutional right to a jury trial. *Duke v. Taylor Instrument Co.*, 391 U.S. 216, 219-20 (1968).

We have found no case or statute requiring a trial by jury in a criminal contempt proceeding in New York until the enactment of the Little Norris-LaGuardia Act in 1935.* This legislation was adopted shortly after the enactment of the federal Norris-LaGuardia Act** and was modelled on the federal law. Like the federal law, it provides for trials by jury in contempt proceedings arising out of labor

* New York Laws 1935, chapters 208, 209, 477. Civil Practice Act, §882-a, enacted by chapter 208 is now to be found in New York Labor Law, §808. Civil Practice Act §882-b, enacted by chapter 477 is now to be found in New York Labor Law, §807.

** 47 U.S. Stat. 70; 29 U.S.C. §§101-115; 18 U.S.C. §3692.

lic employees and provided punishment for violation of the prohibition. It contained no provision with regard to injunctions or contempt of court orders.

In 1967, the Condon-Wadlin Law was replaced by the Taylor Act (New York Laws 1967, ch. 392). This was a more elaborate attempt to deal with public employee labor relations. It provided methods by which public employees and their unions could present their grievances and bargain collectively. At the same time it continued the prohibition against strikes by public employees.

The Taylor Act made only two changes which affected previous law as to contempt. Civil Service Law §211 mandated the chief legal officer of the affected government to apply forthwith for an injunction against an actual or threatened strike and to apply forthwith to punish violation of the injunctive order under the criminal contempt statute. Judiciary Law §751 was amended by adding a new subdivision (2) which provided additional financial penalties applicable only to public employee unions and set forth factors to be considered in fixing the penalties.

The twenty-two years since New York State first began to legislate on the subject of public employee strikes has seen a number of injunction orders issued to restrain such strikes. A not insignificant number of officials of public employee unions have been tried for contempt of such injunctions during this period. See, e.g., *New York City Tr. Auth.* v. *Loos*, New York Law Journal [hereinafter NYLJ], December 20, 1956, p. 3, col. 7 (respondent Loos and others convicted); *New York City Tr. Auth.* v. *Loos*, 9 Misc. 2d 492 (1957) (respondent Zelano acquitted); *City of New York* v.

Sobel, NYLJ, February 5, 1965, p. 16, col. 2, rev'd, 23 AD 2d 35 (summary finding of contempt reversed); *Bd. of Educ. v. Shanker*, NYLJ, October 5, 1967, p. 13, col. 8, 29 A D 2d 634 (contempt conviction affirmed); *State of New York v. Fuller*, 31 A D 2d 71 (1968) (contempt conviction affirmed). We are aware of no claim of abuses in the granting of such injunctions or in the ensuing contempt trials.

No clamor has arisen for extending the Little Norris-LaGuardia Act to public employee labor disputes. Although the Legislature amended Condon-Wadlin repeatedly and has already amended the Taylor Act, it has not attempted to restrict the Court's power to issue injunctions or to try charges of criminal contempt without a jury. Prior to the passage of the Taylor Act, there was a complete review of the entire problem of public employee labor relations (see Final Report [March 31, 1966] of the Committee on Public Employee Relations). If there were any evidence of abuse requiring the extension of the jury trial to public employees to protect them from judicial bias, there would at least have been some reference to the problem in the Taylor Committee Report. More significantly, appellants offered no proof below and make no contention here that there has been any abuse in this or any other cases involving public employees.

There is a very practical reason why the abuses have not appeared in the public sector. In the private sector, the right to strike is guaranteed by statute (Labor Law §§ 703, 713). It is only certain associated activities which can be enjoined such as coercive picketing or illegal boycotts. Therefore, the questions which arise in the private area can be complicated factual ones, and this complexity creates opportunities in which prejudice can operate. By

contrast, in the public sector, there is no such thing as a "legal strike." Consequently, in the contempt proceeding the only real issue is whether there is a strike. Judicial hostility would be difficult to conceal when the question to be decided is so simple.* Moreover, in the injunction proceeding any judicial prejudice against the right to strike can cause no abuse since any such "bias" would merely reflect state law.

(2)

The equal protection clause permits a State to aim remedial legislation at an area where the evil appears without requiring it to reach similar areas where the evil is not so pronounced or does not even exist. As was pointed out by Mr. Justice Holmes in *Patsone* v. *Pennsylvania*, 232 U. S. 138, 144 (1914):

> "A lack of abstract symmetry does not matter. The question is a practical one dependent upon experience. The demand for symmetry ignores the specific difference that experience is supposed to have shown to mark the class."

The Little Norris-LaGuardia Act was remedial legislation. Insofar as it dealt with contempt proceedings, it went no further than the narrow category in which the abuses had been found. These abuses had not arisen with respect

* Difficult questions can arise, as they did below, on the issue of the union's punishment under amended Judiciary Law §751(2) but punishment is determined by the court in all cases. In this connection, it is apparent from the Trial Court's opinion (Juris., App. B), that there was no serious question of appellants' guilt here. Rather, they sought to show that the strike had been provoked. Such evidence was relevant on the issue of punishment only (Judiciary Law §751(2)(a). Indeed, it is difficult to see how appellants could have been prejudiced by the lack of a jury trial on the issue of their guilt.

to public employees, or alimony debtors or any of the hundreds of other categories of actual or potential contemnors. There was therefore no reason for extending this special provision to these other categories. The Legislature was attempting to eliminate an evil, and in so doing, it limited the remedy to the area in which the evil existed.

Certainly, no case can be found which would support the proposition that New York violated the constitutional prescription against invidious classifications when it did not apply the remedy to an area in which the evil had not been shown or even alleged to exist. The law is wholly otherwise.

Even if this were a situation where the Legislature has refused to extend a remedy to apply to a similar evil, appellants would have no complaint. "Evils in the same field may be of different dimensions and proportions, requiring different remedies. Or so the Legislature may think. * * * Or the reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind." *Williamson* v. *Lee Optical Co.*, 348 U. S. 483, 489 (1955); see also *Railway Mail Assn.* v. *Corsi*, 326 U. S. 88 (1945); *A.F. of L.* v. *American Sash Co.*, 335 U. S. 538, 541-42 (1949); *Railway Express* v. *New York*, 336 U. S. 106, 110 (1949).

The appellants' argument comes down to a claim that, if a jury trial is provided in contempt proceedings for one category of labor disputes, it must also be provided for all labor disputes. Equal protection is not so simplistic a doctrine. Appellants' thesis would confront legislatures with endless dilemmas. If all who come within a general

category must be treated with mathematical sameness without the possibility of carving out lesser categories, legislation would have to go beyond the evil sought to be remedied. In this case, the Legislature would have the choice of extending the jury trial and other provisions of the Little Norris-LaGuardia Act to many persons beyond the remedial purpose of the statute or of abandoning the remedial legislation altogether. Confronted with the requirement for such legislative over-kill, a landmark statute might never have been enacted or sustained—a result hardly beneficial to or even desired by public employees.

(3)

Another valid reason for the Legislature's classification is that the grant of a jury trial would undermine the State's policy against strikes by public employees. This is a policy which has no counterpart in the private sector where the right to strike is established by law.

To make its ban on strikes by public employees effective, the Legislature mandated that the chief legal officer "shall forthwith" seek injunctive relief against actual or threatened strikes and, in the event of a violation of the court's order, "shall forthwith" initiate criminal contempt proceedings. (Civil Service Law, §211). Speedy action against actual or potential strikes is thus required by statute.

With such a clear expression of the Legislature's desire for prompt action it is not irrational to conclude that a jury trial would be inappropriate in contempt proceedings involving public employees. A jury trial might prevent a determination of the contempt issue and the application of

the jail sanction. Such a result would render inoperative two of the mechanisms by which the Legislature intended to force speedy termination of public employee strikes and the restoration of government services.

Many strikes by public employees, because they may result in public inconvenience or substantial danger, receive wide publicity and some, like the instant one, so pervade and polarize the community that the selection of an impartial jury would be difficult. In no other situation is a jury called upon to deliberate on guilt or innocence while the alleged criminal acts are still being committed by the defendants on trial. The relatively simple issue of whether a court order has been violated would tend to be obscured by the juror's views as to (1) the wisdom of the Legislature's determination that public employee strikes are illegal *per se* (2) the justice of the strikers' demands (3) the personal impact of the work stoppage on the juror, and (4) the possible financial impact on the juror of the attainment of the strikers' demands.

Aside from the problem of obtaining an impartial jury, there is the problem of delay. The *voir dire*, the opening and closing statements of counsel, the charge and the deliberation of the jury are all potent sources of delay. Moreover, those strikes, such as the one at bar, which arouse strong emotions and receive extensive coverage by the press may lead to applications for a continuance and a change of venue. These motions will have to be heard and decided with attendant consumption of time. The granting of either application would further frustrate the legislative purpose of a speedy determination. A change of venue would also remove both the government officials and the

union leaders further from the bargaining table and from the place where their efforts are required to cope with the effects of the strike.

Finally, a jury trial carries with it a greater likelihood of a mistrial and the possibility of a disagreement.

While these delays continue the union is able to continue to violate the court's mandate thereby frustrating the state's policy. The injunction would lose both its deterrent and remedial effect.

As Chief Judge Fuld noted in his opinion for the Court of Appeals, this need for quick action "to deter the continuance of paralyzing public strikes by visiting punishment on the offenders" fully sustains the validity of the classification made by the New York Legislature (23 N Y 2d at p. 117).

Appellants claim that the jail sanctions have proved ineffective in terminating the strikes (Juris., pp. 12-13) and for that reason contend the classification is improper. The argument ignores proper principles of constitutional adjudication. "The courts may not declare a legislative discrimination invalid unless, viewed in the light of facts made known or generally assumed, it is of such a character as to preclude the assumption that the classification rests upon some rational basis within the knowledge and experience of the legislators." *Metropolitan Casualty Insurance Co.* v. *Brownell,* 294 U.S. 580, 584 (1935).

The fact that the sanctions may not have been as effective as the Legislature might have desired is not conclusive. There is nothing in the record to show how many public em-

ployee strikes were foreshortened or wholly prevented by the enactment of the Taylor Law, the invocation of its procedures, or the application of its sanctions. Nor would it be practicable to determine with accuracy how many unions may in the past have been or may in the future be deterred from acting illegally. "[T]his court ought to be very slow to declare that the state legislature was wrong in its facts" (*Patsone* v. *Pennsylvania, supra,* 232 U.S. at p. 142).

(4)

Appellants argue that to deny a jury trial to non-critical public employees and to grant one to private employees performing essential services is an irrational discrimination (Juris., p. 18). This really is an attack on drawing distinctions between public and private employees generally. Essentially, it challenges the right of the Legislature to bar all strikes by public employees, while permitting strikes in the private sector of the economy including strikes critical to the public health and safety. But this classification with respect to the right to strike—which appellants do not challenge—rests on the soundest of bases (*City of New York* v. *De Lury,* 23 N Y 2d 175, 183-87 [1968], app. dismissed 394 U.S. 455, mot. for reargument pending) and so long as this classification is constitutionally proper, then what is to appellant an irrational distinction is in fact a most reasonable one. For to grant a jury trial would impair the effectiveness of the strike ban in the public area. Thus, the refusal to do so does not offend the equal protection safeguard since the absence of a jury trial is not "wholly irrelevant to the achievement of the State's objective" (*McGowan* v. *Maryland,* 366 U. S. 420, 425 (1961).

POINT II

New York's failure to grant a jury trial to non-critical governmental employees involved in contempt proceedings is not overly broad because: (1) the denial serves to strengthen New York's strike ban and (2) the exception made for private employees from New York's general procedure, which does not provide a jury in contempt proceedings, was done to cure abuses that did not exist in the public sector.

(1)

Appellants' due process claim is that "the statutes as so construed are over-broad and not limited to the area of permissible application" (Juris., p. 5) in that a jury trial is denied all public employees, not just ones whose work is just critical. Appellants carefully avoid saying exactly which statutes are over-broad. The Little Norris-LaGuardia Act, which does not even mention public employees, is not broad at all. That law only carves out an exception to the general rule of court trials by providing a jury trial for those employees involved in private labor disputes. Actually, what appellants are saying is not that the Little Norris-LaGuardia Act is over-broad, but that it is not broad enough because it does not cover non-critical public employees. At this point, the specious nature of the argument becomes clear.

Public employees never were granted a jury trial because the abuses in the private sector which made it necessary were not found in the public sector. If the rationale of the Norris-LaGuardia Acts had been to exclude public employees because the critical nature of their work required

prompt action to end the strike, then appellants might have an argument that the statute goes too far. But the statute was passed to protect the right to strike in the private sector, a policy which does not obtain in the public sector *whether the work is critical or not.* The statute is thus not overly broad, but in terms of its purpose, is precisely commensurate with the evils against which protection was sought.

(2)

New York does not violate due process because it denies a jury trial to non-essential government employees as well as critical government employees. As a matter of state policy, New York has determined to forbid strikes by all governmental employees and that policy applies whether their work is critical or not. No doubt the need to end strikes is most pressing where the workers are directly affecting the public health and safety. Nevertheless, the Legislature has determined that strikes by all public employees are against public policy regardless of the nature of the work. Even if the test were whether the work is essential to the public health and safety, it can hardly be said that the education and supervision of large numbers of school children is not essential.

While it is possible to imagine that there may be some public employees whose work is so insignificant that the delay which a jury trial would impose would have no substantial impact on the public, still, any delay is inconsistent with the state's desire that strikes against the government not be tolerated even briefly.

(3)

Appellants assert that this case involves the question of the constitutional rights of public employees and that somehow the Taylor Act's denial of the jury trial entails the loss of legal rights they would otherwise have. They rely on such cases as *Gardner* v. *Broderick*, 392 U. S. 273 (1968) and *Pickering* v. *Board of Education*, 391 U. S. 563 (1968). These cases involve situations where it was argued that the states could require that public employees accept certain limitations on their constitutional rights such as the privilege against self-incrimination or freedom of speech. Here, however, because of the petty nature of the penalty, there is no constitutional right to a jury trial, and appellants' claim that they are denied a constitutional right is misleading. Private employees are entitled to a jury trial for the petty offense by statute, not by constitutional mandate. The only question presented here is whether the distinction made by New York law is so arbitrary and capricious as to deny equal protection. We believe we have shown that is is not.

The due process argument adds nothing to the equal protection argument. Both must be rejected.

Conclusion

The appeal from the order of the Court of Appeals of the State of New York should be dismissed.

Respectfully submitted,

J. Lee Rankin,
Corporation Counsel
of the City of New York,
Counsel for Appellee.

Frederic S. Nathan,
Stanley Buchsbaum,
William M. Murphy,
of Counsel.

October 9, 1969